A **LING ING KEAT & ORS v. MARTINA PG ISMAIL & ORS**

COURT OF APPEAL, KOTA KINABALU
MOHD ZAWAWI SALLEH JCA
ABANG ISKANDAR JCA
AHMADI ASNAWI JCA
B [CIVIL APPEAL NO: S-02(W)-1553-09-2015]
9 JANUARY 2017

CONTRACT: *Sale and purchase of land – Agreement – Validity of – Alienation of land to defendants – Whether conditions stipulated in letter of offer breached –*
C *Whether sale of land to plaintiffs void ab initio – Whether title of land issued to defendants – Whether defendants had capacity to enter into contract with plaintiffs – Forged power of attorney – Whether entire agreement tainted – Doctrine of severability – Whether applicable*

D ***LAND LAW:*** *Alienation of land – Letter of offer – Terms and conditions – Whether violated – Whether sale of land to plaintiffs valid in law – Whether parties had capacity in law to deal with land – Forged power of attorney – Validity of title – Doctrine of severability – Whether applicable*

Vide letter of offer dated 11 July 2006, the State Government of Sabah
E offered a piece of land for alienation to six individuals, namely, the second to the fifth defendants, Rahinah and Sitimah. The first defendant was the administratix of the estate of the deceased, Rahinah and the sixth defendant was the administrator of the estate of Sitimah. Paragraph 4 of the letter of offer stipulated that the offer shall not be assigned or dealt with in any
F manner by way of a Power of Attorney or by any other means. In 2009, the first to the sixth defendants sold the land to the plaintiffs *vide* a sale and purchase agreement dated 19 August 2009. On 1 June 2012, the State Government issued the title to the said land in the names of the first to the sixth defendants. Subsequently, on 4 June 2012, the defendants entered into a sale and purchase agreement with Bameda Plantations Sdn Bhd ('Bameda
G Plantations'). As a result, the plaintiffs registered a caveat on the said land and subsequently filed a suit against the first to the sixth defendants for specific performance of the plaintiffs' agreement. As an interested party, Bameda Plantations was brought in as the seventh defendant. Bameda Plantations filed a counterclaim against the plaintiffs and the first to the sixth
H defendants for the removal of the caveat lodged by the plaintiffs on the ground that the plaintiffs knew and/or ought to have known that the said land could not have been lawfully sold to the plaintiffs. In any event, it was argued that the plaintiffs' agreement was void since the first and the sixth defendants used forged Power of Attorney to execute the plaintiffs' agreement. The
I plaintiffs, however, argued, *inter alia,* that (i) the doctrine of severability ought to apply in this case and that such doctrine could save the other covenants in the plaintiffs' agreement; and (ii) since the forgery only involved

two persons, the plaintiffs' agreement could be salvaged by excising the two persons from consideration of the said agreement. The defendants, on the other hand, asserted that the land was not alienated to the second to the fifth defendants when the plaintiffs' agreement was entered into in 2009. The High Court Judge dismissed the plaintiffs' claim and allowed the seventh defendant's counterclaim. It was decided that (a) the plaintiffs' agreement and the Power of Attorney had been executed by persons who misrepresented their authority by producing forged Syariah Court orders; (b) the forgery had tainted the plaintiff's entire agreement and it could not confer a valid interest or title in law in respect of the said land to the plaintiffs. Hence, the present appeal. The issues that arose for consideration were (i) whether the doctrine of severability was applicable to the instant case; (ii) whether the plaintiffs' agreement contravened s. 88 of the Sabah Land Ordinance; and (iii) whether Bameda Plantations had a better equity than the plaintiff.

Held (dismissing appeal)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The letter of offer prohibited any dealing with the land by any means, including by way of use of a Power of Attorney. By virtue of the letter of offer, none of the defendants had the capacity in law to deal with the said land. Further, no title was issued for the said land at the date the plaintiffs' agreement was signed. In the circumstances, there was a clear breach of the terms of the letter of offer, specifically para. 4. The plaintiffs' agreement was entered into in violation of the said letter of offer and was void on such account. (paras 15 & 19)

(2) A forged Power of Attorney could not give rise to a valid title in law. It did not matter that the plaintiffs were not privy to the forgery. The fact that only two owners of the said land had fraudulently signed the plaintiffs' agreement could not detract from the fact that the agreement was entered for the whole undivided land and that the forgery had tainted the entire plaintiffs' agreement. Further, the plaintiffs dealt with a piece of land which they knew was not allowed to be dealt with in any way by the State Authority, as per the letter of offer to the defendants. They could not, in the circumstances, be heard to seek for an equitable relief when in fact their hands were less than clean. (paras 22, 23 & 31)

(3) Severability in the law of contract refers to a provision in a contract which stipulates that in the event that parts of the contract were found to be illegal or otherwise unenforceable, then the remainder of the contract should still apply. Therefore, the court would need to look at the contract document itself to decide whether such a provision did exist which would then allow the court to exercise the offending provisions so that the rest of the contractual terms continues to operate for the

benefit of the contracting parties. On the facts herein, since the plaintiffs' agreement was tainted with forged documents, *to wit*, the Power of Attorney, it was unenforceable in law. In such a situation, the doctrine of severability had no application. (paras 25 & 30)

(4) The plaintiffs' agreement was for the sale of the whole undivided piece of land. If the court allowed specific performance only on 5/6 portions of the said land, it would tantamount as rewriting the plaintiffs' agreement. That being the case, severability could not in law, be justified. The plaintiffs' agreement was incapable of salvation. When a party to a contract was found to be incapacitated by law, the whole contract becomes void *ab initio,* as the land involved the whole undivided shares of the respective defendants. (paras 27-29)

(5) Bameda Plantations entered into the agreement with all the defendants who were competent in their respective capacity to enter into the agreement. There were no forged Powers of Attorney. Bameda Plantations' agreement was entered into between the parties after the title in respect of the land had been issued to the defendants. As such, Bameda Plantations did not suffer from any defect which may have tainted it in any way so as to deny it of its *bona fides.* (para 31)

Bahasa Malaysia *Headnotes*

Melalui surat tawaran bertarikh 11 Julai 2006, Kerajaan Negeri Sabah menawarkan sebidang tanah untuk diberi milik kepada enam individu, iaitu, defendan-defendan kedua hingga kelima, Rahinah dan Sitimah. Defendan pertama adalah pentadbir estet si mati, Rahinah dan defendan keenam merupakan pentadbir estet Sitimah. Perenggan 4 surat tawaran memperuntukkan bahawa tawaran tidak boleh dipindah milik ataupun diurus dalam apa jua cara melalui Surat Kuasa Wakil ataupun apa-apa cara lain. Pada tahun 2009, defendan-defendan pertama hingga keenam menjual tanah tersebut kepada plaintif-plaintif melalui satu perjanjian jual beli bertarikh 19 Ogos 2009. Pada 1 Jun 2012, Kerajaan Negeri telah mengeluarkan hak milik tanah tersebut kepada defendan-defendan pertama hingga keenam. Seterusnya, pada 4 Jun 2012, defendan-defendan telah memasuki perjanjian jual beli dengan Bameda Plantations Sdn Bhd ('Bameda Plantation'). Akibatnya, plaintif-plaintif telah mendaftar satu kaveat ke atas tanah tersebut dan kemudiannya, memfailkan tuntutan terhadap defendan-defendan pertama hingga keenam untuk pelaksanaan spesifik perjanjian plaintif. Sebagai pihak yang mempunyai kepentingan, Bameda Plantations telah dimasukkan sebagai defendan ketujuh. Bameda Plantations memfailkan tuntutan silang terhadap pihak plaintif dan defendan-defendan pertama hingga keenam supaya kaveat yang difailkan dibatalkan atas alasan bahawa plaintif-plaintif mengetahui dan/atau sepatutnya mengetahui bahawa tanah tersebut tidak boleh dijual kepada pihak plaintif dengan sah. Dalam apa jua

keadaan, adalah dihujahkan bahawa perjanjian plaintif terbatal memandangkan defendan-defendan pertama dan keenam telah menggunakan Surat Kuasa Wakil palsu untuk menyempurnakan perjanjian plaintif. Plaintif-plaintif, walau bagaimanapun, menghujahkan, antara lain, bahawa (i) doktrin pengasingan terpakai dalam kes ini dan doktrin sebegitu dapat menyelamatkan waad-waad dalam perjanjian plaintif; dan (ii) memandangkan pemalsuan hanya melibatkan dua orang, perjanjian plaintif boleh diselamatkan dengan mengecualikan dua defendan tersebut daripada mempertimbangkan perjanjian tersebut. Defendan-defendan pula menghujahkan bahawa tanah tersebut masih belum diberi milik kepada defendan-defendan kedua hingga kelima apabila perjanjian plaintif dimasuki pada tahun 2009. Hakim Mahkamah Tinggi menolak tuntutan pihak plaintif dan membenarkan tuntutan silang defendan ketujuh. Adalah diputuskan bahawa (a) perjanjian plaintif dan Surat Kuasa Wakil ditandatangani oleh dua orang yang menyalahgunakan kuasa mereka dengan mengemukakan perintah Mahkamah Syariah yang palsu; dan (b) pemalsuan telah mencemar keseluruhan perjanjian pihak plaintif dan tidak boleh memberi kepentingan atau hak milik sah tanah tersebut kepada plaintif-plaintif. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada doktrin pengasingan terpakai dalam kes di sini; (ii) sama ada perjanjian plaintif melanggar s. 88 Ordinan Tanah Sabah; dan (iii) sama ada Bameda Plantations mempunyai ekuiti lebih baik daripada plaintif.

Diputuskan (menolak rayuan)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Surat tawaran melarang sebarang urusan dengan tanah tersebut dalam apa jua cara, termasuk melalui Surat Kuasa Wakil. Berdasarkan surat tawaran tersebut, kesemua defendan tidak mempunyai kapasiti dari sisi undang-undang untuk berurusan dengan tanah tersebut. Tambahan, tiada hak milik dikeluarkan untuk tanah tersebut pada masa perjanjian pihak plaintif ditandatangani. Dalam keadaan ini, terdapat pelanggaran terma surat tawaran, terutamanya perenggan 4. Perjanjian plaintif melanggar peruntukan surat tawaran dan oleh itu, adalah terbatal.

(2) Surat Kuasa Wakil yang dipalsukan tidak boleh mewujudkan hak milik yang sah. Pertimbangan sama ada plaintif-plaintif bukan privi kepada pemalsuan tersebut tidak diambil kira. Fakta bahawa hanya dua orang pemilik tanah tersebut telah menandatangani perjanjian plaintif secara palsu tidak boleh menafikan fakta bahawa perjanjian plaintif dimasuki untuk keseluruhan bahagian tak bahagi tanah tersebut dan pemalsuan telah mencemarkan keseluruhan perjanjian plaintif. Tambahan, pihak plaintif berurusan dengan sebidang tanah dengan pengetahuan bahawa Pihak Berkuasa Tempatan telah melarang pengendalian tanah tersebut dalam apa jua cara, seperti dinyatakan dalam surat tawaran kepada pihak defendan. Mereka tidak boleh, dalam keadaan itu, memohon relif ekuiti padahal tangan mereka tidak bersih.

(3) Pengasingan dalam undang-undang kontrak merujuk kepada peruntukan kontrak yang memperuntukkan bahawa dalam keadaan di mana sebahagian kontrak didapati tidak sah atau tidak boleh dikuatkuasakan, maka, baki kontrak masih boleh diguna pakai. Oleh itu, mahkamah perlu meneliti kontrak itu sendiri dan memutuskan sama ada peruntukan sebegitu wujud dan membolehkan terma kontrak lain dikuatkuasakan bagi manfaat pihak-pihak yang terlibat dalam kontrak. Berdasarkan fakta, memandangkan perjanjian plaintif tercemar dengan dokumen-dokumen palsu, iaitu, Surat Kuasa Wakil tersebut, ia tidak boleh dikuatkuasakan dari sisi undang-undang. Dalam keadaan ini, doktrin pengasingan tidak terpakai.

(4) Perjanjian plaintif adalah untuk penjualan keseluruhan bahagian tak bahagi tanah tersebut. Jika mahkamah membenarkan pelaksanaan spesifik hanya untuk 5/6 bahagian tanah tersebut, ia adalah seakan menulis semula perjanjian plaintif. Dalam kes sebegitu, pengasingan tidak boleh diwajarkan dalam undang-undang. Tambahan, perjanjian plaintif tidak boleh diselamatkan. Apabila sesuatu pihak kepada kontrak didapati tidak berupaya dari segi undang-undang, keseluruhan kontrak menjadi terbatal *ab initio,* memandangkan tanah tersebut melibatkan keseluruhan tanah tak bahagi pihak defendan masing-masing.

(5) Bameda Plantations telah memasuki perjanjian dengan semua pihak defendan yang kompeten dalam kapasiti mereka masing-masing. Tiada Surat Kuasa Wakil yang dipalsukan. Perjanjian Bameda Plantations telah dimasuki di antara pihak-pihak selepas hak milik tanah tersebut dikeluarkan kepada defendan-defendan. Oleh itu, Bameda Plantations tidak mengalami sebarang kelemahan yang boleh mencemarkannya dalam apa jua cara untuk menafikan *bona fides* mereka.

Case(s) referred to:
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC ***(refd)***

Legislation referred to:
Land Ordinance (Sabah) (Cap 68), ss. 4, 88

For the appellant - S Vanugopal; M/s S Vanugopal & Partners
For the 7th respondent - Thomas Ting Shu Kiong; M/s SK Ting & Co

[Editor's note: Appeal from High Court, Sandakan; Civil Suit No: SDK-22-42-8-2013 (affirmed).]

Reported by Kumitha Abd Majid

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] A piece of land was offered for alienation on application, by the Sabah State Government on 11 July 2006, to six individuals namely Rahinah bte Anduman ("Rahinah"), Indarah binti Rakim ("second defendant"), Sainah binti Angkat ("third defendant"), Jakarullah bin OKK Ismail ("fourth defendant"), Abd Hassan Napiah ("fifth defendant") and one Sitimah binti Damit ("Sitimah"). The said land was held under CL 255340599 under PT 96090624 at Sungai Millian in the District of Tongod, Kota Kinabatangan measuring 48.53 hectares/119.920 acres, in size.

[2] In 2009, some three years later, the first to sixth defendants sold the land to Ling Eng Keat, Ling Eng Shoo, Ling Wah Fong, Ling Wah King, and Ling Wah Joo ("the plaintiffs") *vide* a sale and purchase agreement dated 19 August 2009 ("plaintiff's agreement"). A point to note is that Martina binti Pg Ismail ("the first defendant") executed the plaintiffs' agreement as the administratix of the estate of the deceased Rahinah bte Anduman and Abdul Malik bin Maja ("the sixth defendant") executed the plaintiffs' agreement as the administrator of the estate of Sitimah.

[3] The title to the said land was finally issued under CL 255340599 and registered in the name of Rahinah, the second to fifth defendants, and Sitimah on 1 June 2012. At this point, it is worth noting that before the material time, the said land was offered for alienation only, as per para. 4 of the letter of offer, which prohibited assignment or any form of dealings on the land in question, by way of Power of Attorney or otherwise whatsoever.

[4] Pursuant to cl. 2(a) of the plaintiffs' agreement, the sum of RM42,000 was paid by the plaintiffs to the first to sixth defendants and a further sum of RM7,000 was paid in advance, subsequently.

[5] Unknown to the plaintiffs, the first to fifth defendants together with Sitimah, entered into sale and purchase agreement with Bameda Plantations Sdn Bhd ("Bameda Plantations") on 4 June 2012 ("Bameda agreement").

[6] As a result of that, the plaintiffs, had subsequently registered a caveat on the said land on 4 July 2012.

[7] The plaintiffs then commenced an action against the first to sixth defendants for specific performance of plaintiffs' agreement of 2009, among others, in that the defendants specifically perform, undertake, and fulfil their obligations under the said 2009 plaintiffs' agreement.

[8] Bameda Plantations Sdn Bhd was added as seventh defendant/intervener pursuant to a court order dated 4 November 2014.

[9] The defendants' defended the claim by asserting that the agreement is null and void *ab initio* by virtue of s. 88 of the Land Ordinance (Sabah). The land was not alienated to the second to fifth defendants when the plaintiffs' agreement was entered into in 2009. It was entered into merely based on the letter of offer to alienate dated 11 July 2006.

[10] The seventh defendant filed a counterclaim against the plaintiffs and the first to sixth defendants for the caveat lodged by the plaintiffs on the said land to be removed on the ground that the plaintiffs knew and/or ought to have known that the said land could not have been lawfully sold to the plaintiffs.

[11] On 14 August 2015, the High Court dismissed the plaintiffs' claim and allowed the counterclaim by the seventh defendant, thus this appeal before the Court of Appeal by the plaintiffs.

The Appeal

[12] During appeal before us, the plaintiffs put before us the following questions for determination, namely:

(a) Whether the learned High Court Judge misconceived the doctrine of severability when he held that the doctrine was inapplicable to the instant case because,

(i) Two of the defendants had used forged documents to execute the plaintiffs' agreement of 2009 and that therefore the whole agreement was tainted with illegality;

(ii) There are no provisions in the plaintiffs' agreement of 2009 for severance in the event any of the parties is found to be a fraud.

(b) Whether the learned High Court Judge erred when he held that there is no provision in the agreement for severance of covenants or provisions from the other parts?

(c) Whether the learned High Court Judge erred when he held that the two falsified perintah perlantikan pentadbir would nullify the entire agreement?

(d) Whether the learned High Court Judge erred when he held that the plaintiffs' agreement contravened s. 88 of the Sabah Land Ordinance?

(e) Whether the learned High Court Judge erred when he held that Bameda Plantations had a better equity than the plaintiff?

Our Findings

[13] For clarity, we will refer to the parties in this appeal as they were described in the High Court proceedings. We had occasion to peruse through the grounds of judgment of the learned trial judge, the cause papers and of course the notes of proceedings and the various documents in the records of

appeal. Upon such exercise, we were of the view that the case for the plaintiffs would hinge mainly on the issue of illegality, if proven, and how it would impact on the validity of their claim. In that context, the issue on the doctrine of severability would be discussed.

[14] Now, from the records of appeal, we could see that the defendants were offered alienation of the said land by the State Government of Sabah *vide* a letter of offer dated 11 July 2006. Then in 2009, they entered into the plaintiffs' agreement with the plaintiffs, whereby it was stipulated therein that the said land be sold to the plaintiffs, for a stated sum of consideration. On 1 June 2012, the State Government had issued the title to the said land in the names of the first to sixth defendants. On 4 June 2012, the defendants entered into a sale and purchase agreement with Bameda Plantations, the seventh defendant in this case. Then this suit was filed by the plaintiffs against the first to sixth defendants for specific performance of the plaintiffs' agreement. As an interested party, Bameda Plantations was brought in as the seventh defendant. It had a counterclaim against the plaintiffs for the removal of the caveat which the plaintiffs had lodged over the said land in July 2012 in a purported exercise to protect its perceived apparent interest in the said land.

[15] From that brief narration, it was clear to us that the plaintiffs' agreement of 2009 was entered into in violation of the letter of offer dated 11 July 2006. A reference by us to the para. 4 of the letter of offer would reveal the following stipulation:

> This offer shall not be assigned or dealt with in any manner by way of Power of Attorney or by any other means.

[16] The Sabah Land Ordinance (Cap 68) defines 'dealing' under s. 4 therein, as follows:

> 'dealing' means any transaction of whatever nature by which land is affected under this Ordinance.

[17] We noted that the learned trial judge did allude his mind to this factual circumstance in his grounds of judgment. This can be seen at p. 9 of his grounds of judgment, where he had said:

> Therefore, not only that the Power of Attorney given to the Plaintiffs was not allowed by the said Letter of Offer but it was also bad in law as it was given pursuant to forged Syariah Court Orders.

[18] On the ground that the dealing done by the first to sixth defendants with the plaintiffs *via* the plaintiffs' agreement, it was a clear breach of the terms of the letter of offer dated 11 July 2006, specifically of para. 4 that expressly provided as follows:

> This offer shall not be assigned or dealt with in any manner by way of Power of Attorney or by any other means.

[19] As such, the plaintiffs' agreement was made between the respective parties in contravention of the express terms of the letter of offer dated 11 July 2006. Clearly, the first to sixth defendants had no authority to deal with the said land with the plaintiffs. It was done against public policy, bordering on illegality. In other words, none of the said defendants had the capacity in law, to deal with the said land as was expressly stated in the letter of offer. Two things were clear in respect of the letter of offer. First, it was just a letter of offer to alienate which the first to sixth defendants accepted on condition as stated as terms therein. Second, no title to the said land was issued at the time of issue of the letter of offer and neither was there a title issued to the said land at the date of signing of the plaintiffs' agreement on 19 August 2009. The title was only issued on 1 June 2012. In other words, the letter of offer prohibited expressly any dealing with the said land by any means, including by way of use of a Power of Attorney. As such, the plaintiffs' agreement was void on such account.

[20] In any event, the case was argued on the basis that the plaintiffs' agreement was void because of the use of forged Powers of Attorney by two of the defendants, namely Martina binti Pg Ismail (the first defendant) and Abdul Malik bin Maja (sixth defendant).

[21] In this regard, we found that the learned trial judge had found as a fact that those circumstances pertaining to forgery were established by the evidence led before him. In this case, the 2009 plaintiffs' agreement was entered into by the said two persons by using forged Sandakan Syariah Court Orders whose falsity was confirmed by Mohd Nur Assyarif bin Mohd Saad ("DW2"), an Assistant Registrar of the Sandakan Syariah Court. The evidence of DW2 in the trial court below was clear. The record shows the following evidence having been testified:

> Merujuk Salinan perintah di muka surat 4 nama pemohon dan nama si mati bukanlah merujuk kepada nombor kes di dalam rekod Mahkamah Syariah Sandakan. Salinan perintah di muka surat 5 tiada sama sekali di dalam rekod Mahkamah. Ini bermakna kedua-dua perintah tersebut tidak pernah dikeluarkan oleh pihak Mahkamah Syariah Sandakan.

[22] Based on the above-quoted testimony of DW2, the learned trial judge found as a fact that the plaintiffs' agreement and the Power of Attorney had been executed by persons 'who misrepresented their authority by producing forged Syariah Court Orders.' As such, it was his finding in law that, on the recent authority of the Federal Court decision in *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173 a forged Power of Attorney could not give rise to a valid title in law and that the Sabah Land Ordinance does not seek to give validity to such a title, even to a *bona fide* purchaser without notice. In other words, it matters not one bit that the purchasers, being the plaintiffs in this appeal before us, that they were not privy to the forgery. The transaction would be effectively struck down as being bad, on account of the

forged documents used to effect the transaction *via* the plaintiffs' agreement. The learned trial judge had also ruled that the fact that only two owners in the said land had fraudulently signed the plaintiffs' agreement would not detract from the fact that the plaintiffs' agreement was entered for the whole undivided land and that the forgery had tainted that entire plaintiffs' agreement and it could never confer a valid interest or title in law, in respect to the said land to the plaintiffs. The letter of offer, *via* para. 4 therein, prohibited any kind of dealings on the said land by the defendants to anyone, either by way of a Power of Attorney or by any other means. In other words, the defendants had no title in the said land. We noted that the learned trial judge had stated in his grounds of judgment that the Latin maxim of *Nemo dat quod non habet* applied to the factual circumstance in the case before him, namely no one can give a better title than he himself possesses.

[23] With respect, we found the findings made by the learned trial judge to be sound in law. They were founded upon concrete evidence before him as well as the authoritative pronouncement by the apex court in relation to the legal position on the issue of the effect of the use of forged document to effect the transaction between the parties that sought to transfer the interest in the said land to the plaintiffs.

[24] Learned counsel for the plaintiffs had also submitted that the doctrine of severability ought to apply in this case and that such a doctrine could save the other covenants in the plaintiff's agreement.

[25] What is exactly the so-called doctrine of severability in the law of contract? The word severability has its genesis from the Latin word '*salvatorius*' and in the context of severability in the law of contracts, it refers to a provision in a contract which stipulates that in the event that parts of the contract are found to be illegal or otherwise unenforceable, then the remainder of the contract should still apply. As the word suggests it seeks to salvage the rest of the contractual provisions although certain other terms of the same contract are found to be unenforceable. Therefore, the court will need to look at the contract document itself to see whether such a provision does exist which would then allow the court to excise the offending provisions so that the rest of the contractual terms continue to operate for the benefits of the contracting parties.

[26] Reverting to the factual matrix of this case before us, we noted that the learned trial judge had studied the plaintiffs' agreement of 2009 and he found that there was nothing in the said plaintiffs' agreement that provided for such a provision for severability. As such, he had concluded as follows: (see p. 10 of the GOJ)

> Close scrutiny of the Plaintiffs' Agreement will reveal that the said Agreement does not provide for the transfer of parts or in this case 5/6 portion of the said land. There is no provision to provide for the sale or transfer of parts of the said land in the Plaintiffs' Agreement in the event of default or defective title by the other vendors. Hence, this was never the intention of the parties.

[27] The learned trial judge then cited the Federal Court decision in the case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 where the apex court reiterated the cardinal principle of commercial law that the courts will not rewrite a contract by introducing terms into it just that by so doing, a reasonable interpretation may be made of it. Having this principle at the forefront of his mind, the learned trial judge had concluded on this issue as follows, at p. 10 of his grounds of judgment thus:

> We have to bear in mind that the Plaintiffs Agreement is for the sale of the whole undivided piece of land. If the Court allows specific performance only on 5/6 portions of the said land it would tantamount as rewriting the Plaintiffs' Agreement.

[28] That being the case, severability could not in law, be justified. The plaintiffs' agreement was incapable of salvation. With respect, we were in agreement with the learned trial judge in his reasoning as well as his finding on the issue of severability.

[29] In the circumstances, we found no reason to fault the learned trial judge in coming to the conclusion that he did. In fact, the plaintiffs attempted to extend the applicability of the doctrine of severability to the parties to the plaintiffs' agreement. It had appeared in the alternative pleadings of the plaintiffs that as the forgery only involved two persons, the plaintiffs' agreement could be salvaged by excising the two persons from consideration of the said agreement. To this, the learned trial judge had disagreed. He had his reason. It is this. It involved the capacity of the two persons to enter into the said agreement. As their purported authority to act was obtained through fraudulent means, it affected their respective capacity to execute the plaintiffs' agreement as holders of the letter of offer dated 11 July 2006 in respect of the said land. Secondly, it involved the whole undivided shares in the said land. Severability does not relate to capacity of the parties to enter into a contract. As such, in the context of this case, when a party to a contract was found to be incapacitated by law, the whole contract becomes, in law void *ab initio*, as the land involved the whole undivided shares of the respective defendants.

[30] Suffice for us to state here that there was no cogent reason for us to disturb the learned trial judge's handling of the issue on the severability or otherwise of the plaintiffs' agreement. We endorsed his finding. In fact, as the plaintiffs' agreement was tainted with forged documents, *to wit* the Power of Attorney, it is unenforceable in law. In such a circumstance, the doctrine of severability has no application.

[31] On the issue of which of the parties had a better equity, we were of the considered view that this would be a non-starter. We said so because Bameda Plantations Sdn Bhd entered into the agreement with all the defendants who were competent in their respective capacity to enter into the agreement. There was no use of unauthorised Syariah Court orders, unlike the purported 2009 plaintiffs' agreement, where forged Powers of Attorney were employed. This fact was known to the plaintiffs in 2011 before they filed this suit against the defendants in 2013. What was more telling to us is that when the defendants entered into the 2009 plaintiffs' agreement with the plaintiffs, they only had a letter of offer which expressly contained para. 4 which prohibited any kind of dealing with the said land. As compared with the Bameda Plantations agreement entered into between parties on 5 June 2012, it was entered into after the title had been issued in respect to the land to all the defendants on 1 June 2012. In other words, the Bameda Plantations agreement did not suffer from any defect which may have tainted it in any way so as to deny it of its *bona fides*. In light of the above scenario, it was clear to us, on balance, where the better equity had tilted in favour of. Definitely, it was not on the side of the plaintiffs. They were dealing with a piece of land which they knew was not allowed to be dealt with in any way by the State Authority, as per the letter of offer to the defendants. They could not be heard to seek for an equitable relief when in fact their hands were less than clean. As is trite, the courts will not assist such litigants.

[32] As a conclusion, we were unanimous in our view that this appeal be dismissed with costs. The grounds provided by the learned High Court Judge were legally sound and he was correct on his findings of facts. He had not been plainly wrong such that we must intervene in order to right a plainly wrong decision. This had not been such a case. We therefore had affirmed his whole decision. We also had awarded costs of RM10,000 to the defendants/respondents subject to allocator. Deposit was refunded to the plaintiffs, being the appellants.